STATE OF VERMONT

HUMAN SERVICES BOARD

In re	)	Fair Hearing No. S-03/08-135
	)	
Appeal of	)	

INTRODUCTION

The petitioner appeals the decisions by the Office of Vermont Health Access (OVHA) terminating her VHAP benefits and not retroactively reinstating the petitioner's VHAP coverage following the petitioner's failure to pay her premium in a timely manner. The issue is whether the regulations bar retroactive reinstatement of benefits.

The facts in the case are not in dispute. In lieu of an oral hearing the parties have submitted written legal arguments. The following findings are based on the facts set forth in the parties' memoranda.

FINDINGS OF FACT

1. In February 2008 the petitioner was enrolled in VHAP Managed Care, subject to a monthly premium of $25.

2. On February 15, 2008, when the petitioner had not paid her premium due for March, OVHA sent her a notice that her VHAP coverage would end on February 29 if she did not pay her premium by that date.

3. When OVHA had not received the petitioner's premium by February 29 it "disenrolled" the petitioner from VHAP effective that date.

4. On March 5, 2008 OVHA received a premium payment from the petitioner of $75. Based on this payment OVHA notified the petitioner that she would be "reenrolled" in VHAP Managed Care beginning April 1, 2008. The petitioner filed an appeal with the Board on March 27, 2008.

5. Following continuances requested by the parties, the petitioner submitted an OVHA form "Medical Incapacity Certificate" from her doctor dated July 29, 2008 stating that the petitioner was unable to pay her premium in February due to her mental incapacity at that time (see *infra*).

6. Based on this information, which OVHA does not dispute, OVHA revised its decision in the matter and found the petitioner retroactively eligible for VHAP "Limited" coverage effective March 5, 2008, the date it had received her premium, through April 1, 2008, the date it had reinstated the petitioner's VHAP "Managed Care" coverage.

7. The issue that remains in this matter is whether the petitioner should get retroactive VHAP coverage for the period March 1 through March 4, 2008. The following facts,

agreed upon by the parties, frame the significance of coverage for those dates.

8. The petitioner suffers from a bipolar disorder. In February 2008, according to her doctor, she had a "severe major depressive episode". She was seen in the hospital emergency room on February 29, 2008, and on March 3 she was admitted to the inpatient psychiatric unit for four days.

9. As noted above, the petitioner, or someone acting in her behalf, paid her overdue VHAP premium on March 5, 2008. Inasmuch as OVHA has granted retroactive coverage effective only as of March 5, the first two days of the petitioner's hospitalization, March 3 and 4, and any other medical expenses she incurred between March 1 and March 4, remain uncovered.

ORDER

OVHA's decisions terminating the petitioner's VHAP as of February 29, 2008 and not granting the petitioner retroactive VHAP coverage to March 1, 2008 are reversed.

REASONS

As a general matter, the regulations provide that "[i]ndividuals who have been disenrolled from the VHAP program must file a new application for the program before

eligibility may be reestablished". W.A.M. § 4002.3. Once such an individual reapplies, VHAP Managed Care enrollment begins "the first of the month after the department has received and processed the full premium payment". W.A.M. § 4002.32. Another provision of the regulations provides, however, that "limited" VHAP coverage (as opposed to "full" coverage under VHAP Managed Care) can be granted "between the date the department determines eligibility and the date full coverage begins". W.A.M. § 4002.31. Individuals who have been disenrolled from VHAP due to nonpayment of their premium qualify for "limited" VHAP coverage *only* if they apply to reenroll within twelve months *and* they meet one of five "exceptions" specified in the regulations, one of which is "incapacity". W.A.M. § 4002.31E. As noted above, there is no dispute in this matter that the petitioner met the definition of "incapacity" when she did not pay her February premium in a timely manner. See W.A.M. § M150.1A(1).

OVHA, upon receiving the petitioner's late VHAP payment on March 5, 2008, relied on the above provisions initially in not "re-enrolling" the petitioner in VHAP Managed Care until April 1, 2008, and later in not granting the petitioner retroactive "limited" VHAP coverage effective before March 5. However, it must be concluded that OVHA's exclusive

application of the above provisions to the facts of this case is misplaced.

As noted above, the petitioner filed her appeal in this matter on March 27, 2008. Although the appeal was filed after the petitioner had paid her premium and had been reenrolled effective April 1, 2008, the appeal was also well within the 90-day limit following OVHA's notice of disenrollment on February 15, effective February 29, 2008. See Fair Hearing Rule No. 1000.2A (formerly Rule No. 1). OVHA and petitioner's counsel have treated this case solely as an appeal of the retroactive date of the petitioner's *reenrollment*, but there is no equitable or jurisdictional reason not to also consider this as an appeal of OVHA's original decisions on February 15 and 29, 2008 to *disenroll* the petitioner from VHAP Managed Care in the first place. Although the petitioner did not file her appeal in time to receive continuing benefits after February 29, as in any appeal before the Board, if she prevails, OVHA is required to *restore* the benefit (in this case, VHAP Managed Care) that it "improperly" took away.

The provisions cited by OVHA pertaining to VHAP "Limited" coverage upon "reenrollment" are not necessarily applicable to cases, such as this, when the original decision

to *disenroll* an individual from VHAP Managed Care is, itself, in dispute. In this case, OVHA concedes at the outset that the petitioner, albeit *ex post facto*, but nonetheless in a hearing *de novo*, was able to medically verify that she was *unable* to pay her premium in a timely manner in February 2008 due to her mental "incapacity" at that time. OVHA argues that even if it had learned of the petitioner's incapacity (i.e., her *inability* to pay her premium due to a medical crisis) *before* the end of February it would have been *required* to have terminated her VHAP benefits when she did not pay her premium. Even if there were such a regulation, its application in such circumstances could not stand either as a matter of fundamental due process or as being rationally consistent with the remedial nature of the VHAP program, itself. See *Littlefield v. D.E.T.*, 145 Vt. 247 (1984). Even *ex post facto*, OVHA cites no regulation or policy specifically *preventing* itself or the Board, pursuant to a *de novo* hearing, from granting the petitioner, as "appropriate relief" (see 3 V.S.A. § 3091[d]), a "restoration" of her VHAP *Managed Care* benefits retroactive to the date they were terminated, especially when VHAP was necessary to cover the treatment and alleviation of the "incapacity" itself.

Clearly, the regulations cited by OVHA are intended to apply whenever an individual *reapplies* for VHAP *within a year of being terminated*, which is well beyond the limits and contemplation of a case such as this in which a timely appeal is filed. Nothing in the language of these provisions dictates that they also govern an individual's due process rights to *relief* pursuant to an appeal of the underlying decision to have terminated coverage. In this case there is no dispute that (1) the petitioner timely appealed OVHA's decision to terminate her coverage, (2) OVHA later determined that the petitioner was incapable of taking the action that could have avoided the termination, and (3) the petitioner promptly (as soon as she *was* able) cured the basis of the termination. Therefore, it must be concluded that OVHA is required, as a matter of due process and the petitioner's rights under 3 V.S.A. § 3091(d), to retroactively restore the petitioner's eligibility for VHAP effective March 1, 2008.[1]

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[1] It is unnecessary for the Board to consider the parties' arguments as to whether OVHA's action violated the petitioner's rights under the Americans with Disabilities Act (ADA).